BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: March 20, 2001
Case Nos: 2000-INA-312

In the Matter of:

PATRICIA LUNDVALL and JERRY BUSSELL
Employer

On Behalf of:

MA ISABEL VASQUEZ
Alien

Appearance: Pat Lundvall, Esq.
for the Employer and the Alien

Certifying Officer: Pandora L. Wong, San Francisco

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Ma Isabel Vasquez ("Alien") filed by Employer Patricia Lundvall and Jerry Bussell("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On November 17, 1997, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Estate Manager for Employer, husband and wife whose occupations were golfer (professional)and attorney, respectively.

The duties of the job offered were described as follows:

"Coordinates activities of estate. Supervises staff engaged in such activities as preparing, cleaning, gardening, and other maintenance functions. Plans, oversees, and direct activities of staff engaged in estate duties. Coordinates security for estate. Plans, oversees, and directs activities of contracted security staff and personnel. Reports any misfeasance or all of staff. Hires and fires, contracts and pays all estate personnel as required. Negotiates with community, business, and public utility representatives to coordinate and maintain estate functions. Plans and coordinates menus for day to day operation as well as social function. Coordinates with special staff for social functions. Does the daily marketing. Plans and coordinates and pays all estate obligations from special account. Accounts for all monetary expenditures. Coordinates and assists in the budget process directly with employer." (Uncorrected)

No education and two years experience in the job, were required or four years experience in the related job of industrial cleaning maid. Wages were $10.50 per hour. The applicant reports to the OWNER; number of employees supervised was marked "N/A" by Employer. Special requirements (as corrected) were: "Must have excellent recommendations. Must understand the operation of a check book and be able to balance and control same. Must be bondable and me(e)t bonding company requirements. Must have or be able to obtain Nevada drivers (l)icense. Must meet insurance company requirements (Clear DMV) in order to drive estate vehicle as required to complete job duties. Automobile

will be made available as needed for employment duti(e)s only. Must have ability to operate and learn various software programs upon entry to employment. Training will be available." The position was classified as "Home Housekeeper" by the CO. (AF-73-176)

On January 5, 2000, the CO issued a NOF proposing to deny certification. The CO stated that Employer had not demonstrated that it would employ a fulltime person for the job opportunity. There is a question whether there is a bona fide job opening and whether fulltime work can be provided. Corrective action would be to submit rebuttal evidence including a copy of business license, state and federal business income and business tax returns. Secondly, Employer may have violated 20 CFR 656.21(b)(2)(i)(A) in that the four years experience for "related occupation" is considered restrictive. Specific vocational preparation time for a home housekeeper is one to two years. Corrective action would be to either amend the requirement and readvertise, or justify the requirement by demonstrating it is a business necessity and not just a preference or document that the requirement is usual in the occupation. The CO further stated Employer may have violated 20 CFR 656.21(b)(2)(ii) in that qualified U.S. applicants were rejected for non legal reasons. Specifically, there was insufficient evidence to indicate that Employer had sufficiently followed up with applicants Brewer, Lykken and St Creigh. Corrective action required was explaining with specificity the lawful job-related reasons for rejecting each of the applicants.(AF-29-31)

On January 31, 2000 Employer forwarded its rebuttal contending that; "All persons who have worked for us (list attached) have done so on an independent contractor basis. In the past Mr. Bussell was home more and managed the day to day activities of the house by use of independent contractors. However, since he joined the golf tour he is not at home as much or available to manage the day to day activities of the household. Nor, is he able to oversee independent contractors. This is one of the main reasons we desire to have a full-time household manager." With respect to the restrictive requirement, Employer agreed to readvertise. With respect to applicant Brewer, she failed to respond to the written follow-up inquiry. Further attempts to contact her were unsuccessful. With respect to applicant Lykken, he returned the follow-up questionnaire. Letters to both his listed addresses were not responded to and telephonic follow-up was unsuccessful. Applicant St Creigh never responded to request for follow–up information. Never responded to letter rejecting him. Employer stated: "All of the above addressed applicants were found not qualified for business related reasons. The primary reason being that the applicants did not make contact with me in response to my requests in order to continue with their

application process. Each applicant-noted above-was provided with 1) a request for additional information, as were all applicants; and 2) a letter informing them of the specific finding upon their qualification. None of the applicants made contact, either after the initial notification or again after the second letter informing them of my findings. I cannot control their lack of response or lack of interest in my available position". Employer, therefore, alleged all applicants were lawfully rejected. Employer attached income tax returns and lists of independent contractors, plus a statement of willingness to readvertise.(AF-6-68)

On April 12, 2000, the CO sent out a "Supplemental" NOF stating; "Job opening? (See NOF of 1/5) You rebut that the people working for you are independent contractors and the husband managed the household until he began traveling a great deal. The 'employees' the household manager is supposed to supervise are in fact private businesses. You do not in fact employ staff for this position to supervise. Corrective action stated in NOF has not been complied with. Your rebuttal shows this position to be more that of a Domestic Cook or General Houseworker." With respect to the restrictive requirement in the original NOF, the CO stated that "Your amendment to the ETA750A is acceptable." As a part of its instructions the CO stated: "**Further, this office will NOT grant an extension of time to conduct a new test of the labor market because the application will be forwarded to the Employment Service to coordinate a new test of the labor market**." No mention was made by the CO as to the rejection of U.S. applicants. (AF-11-13)

On May 8, 2000, Employer forwarded its rebuttal stating that the only remaining issue after the Supplemental NOF was whether the job opportunity was fulltime and could be provided for by Employer. Employer stated further: "As we previously stated, due to our business activities we require a person to manage the details of our estate, in particular to supervise those individuals that perform maintenance activities, catering activities, construction activities, etc. Regardless if the persons supervised are private business, public entities, or independent contractors, all of these require supervision, planning and coordination..In our case you originally relied on the definition of employment in Section 656.35 on the theory that we must establish that the duties of the job will keep the worker occupied throughout a substantial portion of the work day. We hold that our submission has demonstrated such and that the definition of employment in Section 656.3 cannot be used to attack our needs for the position by questioning the hours or conditions of managing our estate through independent contractors versus employees. We need-as established by the attached list of events- a person to manage these functions. No one met the

requirements when the position was advertised." (AF-6-10)

On June 21, 2000, the CO issued a Final Determination denying certification, stating: "NOFs questioned whether you actually have the job opening described in box 13 since you have no employees. You rebut that the independent contractors you treat with are 'employees' insofar as you ask the position to supervise them. The first rebuttal evidence you presented indicated that the 'employees' supervised are not private individuals but companies providing services. Since you don't hire and fire these firms but buy their services, they aren't employees for the Housekeeper to supervise. The evidence remains that the duties to be performed are more those of a Domestic Cook and/or General Houseworker than of a Home Housekeeper. The Housekeeper duties appear to have been inflated in order to qualify this job as 'skilled' and avoid the non-skilled visa cap. You have not convincingly shown there is a job opening of Home Housekeeper to which U.S. workers can be referred." (AF-4-5)

On July 25, 2000, the Employer filed a request for reconsideration or in the alternative for review of denial of labor certification.(AF-1-3) A brief in support of appeal was faxed.

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not at issue before the board. Barbara Harris, 1988-INA-32 (1989). An NOF is required to provide an employer with adequate notice of the deficiencies in order to provide a fair opportunity to address those deficiencies. Downey Orthopedic Medical Group, 1987-INA-674 (March 16, 1988)(en banc); Miaofu Cao, 1994-INA-53 (March 14, 1996)(en banc).

The reason given in the Final Determination for denial of labor certification by the CO was that Employer had not demonstrated that the job offered was a fulltime Home Housekeeper rather than a domestic cook or general housekeeper. By giving this basis as the sole reason for denial in its Final Determination, the CO has impliedly accepted Employer's rebuttal to the original NOF with respect to the good faith efforts of Employer in rejecting U.S. applicants. Barbara Harris, supra. On the other hand, the CO's lack of followup on readvertising is puzzling. Employer, in its rebuttal, specifically agreed to

readvertise excluding the restrictive requirement objected to, and the CO in bold letters stated that the application would be forwarded to the Employment Service for a new test of the labor market. No result of this survey was entered into the record nor did the Final Determination address the issue.

In its motion for reconsideration Employer makes the strong and plausible argument that in its original application it had listed the job offer as “estate manager” but that the CO insisted on a different classification, originally “Home Housekeeper”, apparently the closest description of the duties Employer stated in the ETA that is contained in the Dictionary of Occupational Titles (D.O.T.). Included under this job title, is supervision of employees. Employer, however, never stated the job offer position included supervising employees. Moreover, Employer’s assertions, if credible, may justify the job offer whatever its job classification. She has demonstrated by tax returns, earnings sufficient to afford a manager of the “estate”. Not documented, however, is the necessity for the “estate” to be “managed” even given that various contractors must be dealt with. Not documented either is the mere assertion that Jerry Bussell is a professional “traveling” golfer and would not be able to assist in management of the estate. No income has been clearly documented as made by him in that capacity. Alternatively, why can’t Pat Lundvall assist in supervising independent contractors? Moreover, we hasten to point out that when the job offer under the title of “Estate Manager” had been utilized in recruitment efforts in 1997, many of the eleven applicants appeared very ably qualified and available for the job offer. Further casting doubt on the bona fides of the job offer is that these applicants were sent a form letter dated July 3, 1997 that can only be described as discouraging applicants. For example, the letter stated: “I was overwhelmed with the number of applicants. In reviewing the resumes I find applicants qualified in a general way but can not answer specific questions as to qualifications for the job duties. In order to expedite my selection and to avoid a waste of time for all concerned I have developed a questionnaire directed specifically at the job duties and experience requirements.” After requesting responses, the letter concluded: “My schedule for the next weeks is quite full due to business related demands. I am hoping to be able to schedule interviews–either in person or by telephone during the first week of August.” (AF-151-161) Additionally, alien’s experience would not seem to qualify her for the position of estate manager. Her most recent work was in cleaning busses. Prior thereto, she listed work as a “home attendant” for a Patty David, even though no supervisory requirements appeared needed in that job. At the time she started this employment she was under 20 years of age. Thus under the case of Carlos Uy III, 1997-INA-304 (Mar.3, 1999)(en banc) Employer/alien would not pass the “totality of circumstances”

test for the position that Employer described originally as “Estate Manager”, and which the state agency classified as “Home Housekeeper”.

By the same token, the CO’s sole basis for rejection of the application in the Final Determination was that because the job position did not call for supervision of employees the job offer was perceived by the CO to not be that of a Home Housekeeper. However, this creates a “Catch-22" for Employer. Employer never did contend the job offer involved supervision of employees; it was the CO that insisted upon the job classification as a “Home Attendant”, and then found this category not fulfilled. As stated by Employer in her request for reconsideration: “We do not need a maid, cook or housekeeper on a full time basis. We use contract employees to complete those duties. We do not need a full time exterior staff person as we use contract employees to complete those duties. What we need is an employee to oversee, supervise, and insure performance of those duties by the independent contractors we hire. We need a person to obtain these contract employees, account and pay for these employees...If we desired to have a maid or cook that is the position which would have been advertised.”

We believe that under the circumstances this matter must be remanded for further action, despite its long history. The CO’s basis for denial is too speculative and subjective. A job offer does not always fit neatly into a D.O.T. definition and the CO should not force an Employer to adapt a specific D.O.T. description when it is not applicable. While we have skepticism of the bona fides of Employer’s recruitment efforts, the job offer itself and alien’s qualifications, such grounds were not given by the CO as a basis for denial in the Final Determination. Moreover, Employer was not asked the correct questions in connection with those issues, and to deny certification on the basis of this record might deny them due process. If Employer’s bare assertions, that the duties required are, indeed, necessary and not mere preferences for Employer and, therefore, are a fulltime job offer they should have been given further opportunity to document same. In that connection, Employer’s arguments on appeal cannot be a basis for our determination. On remand, the results of the retesting of availability of U.S. workers, if they indeed were accomplished, may be given consideration.

ORDER

The Certifying Officer's denial of labor certification is VACATED, and this matter remanded for further action.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge